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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-515

FRED J. ZEEHANDELAAR,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Attorneys for Petitioner:
JAC M. WOLFF,
655 Madison Avenue
New York, New York 10021
(212) 688-7200

HENRY J. BOITEL,
233 Broadway
New York, New York 10007
(212) RE 2-8104

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—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Fred J. Zeehandelaar prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered against him on September 8, 1975, which affirmed an Order of the United States District Court for the Southern District of New York. The Order of the District Court had imposed a new sentence upon petitioner with respect to a judgment of conviction, a portion of the prior sentence having previously been declared illegal by the Court of Appeals.

Petitioner further prays that the instant petition be considered in conjunction with his already pending petition, *Zeehandelaar* v. *United States*, Docket No. 75-277.

Opinions Below

The Court of Appeals affirmed the judgment of conviction without opinion on May 7, 1975, *United States* v. *Zeehandelaar*, 516 F.2d 897 (2d Cir., 1975). The order of affirmance, however, remanded the case to the District Court for correction of an improper sentence Appeals affirmed the legality of the new sentence in rehearing en banc (4a) were both denied on July 23, 1975, without opinion.

Pursuant to the order of the Court of Appeals, the case was remanded to the District Court for a resentencing of the petitioner. Following resentencing, the petitioner again appealed to the Court of Appeals on an expedited basis. On September 8, 1975, the Court of Appeals affirmed the legality of the new sentence in a brief memorandum-order (5a).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was filed on September 8, 1975 (5a).

Question Presented for Review

Where a District Court, as part of a criminal sentence, requires that the defendant, as a condition of probation, make a $5000 contribution to the United States Department of the Interior, and where the Court of Appeals subsequently declares such a forced contribu-

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* References to the Appendix to this Petition are as follows: "-a". References preceded by "A." are to the Appellant's Appendix filed in the Court of Appeals under that Court's Docket No. 75-1026.

tion to be illegal, may the District Court subsequently substitute an equivalent criminal fine in place of the forced contribution? Does such an increase in the sentence constitute a violation of the due process and double jeopardy clauses of the Fifth Amendment?

Constitutional Provision Involved

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case *

Following a jury trial, the petitioner was convicted of having made a false declaration during his testimony at a prior trial in violation of 18 U.S.C. § 1623. That statute provides that, in the event of a conviction, a defendant, "shall be fined not more than $10,000 or imprisoned not more than five years, or both."

In the present case, the District Court pronounced sentence as follows:

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* This statement of the case is limited to facts in relating to Petitioner's sentence. A detailed statement of facts is set forth in the companion petition, *Zeehandelaar* v. *United States*, 75-277.

> "Defendant is placed on unsupervised probation for a period of one year, upon *condition that he pay the sum of $5000 to the Department of the Interior, which shall be used in connection with the preservation of endangered species*, payment to be arranged by the probation department" [emphasis added] (A. 1294; *See also* Judgment at A. 1302).

The legality of the forced contribution was one of the issues raised upon the appeal to the Court of Appeals. The order of the Court of Appeals, which affirmed the judgment of conviction herein in other respects, also provided that:

> "[I]t was improper for the trial court to order appellant to pay a sum to the Department of Interior, 'which shall be used in connection with the preservation of endangered species. . . .'
>
> Such a forced contribution is an improper sentence. Accordingly, we affirm in all respects except as to the sentence imposed, and we remand to the lower court solely for resentencing; any fine imposed upon such resentencing may not exceed $5000, the amount of the contribution originally imposed." (Appendix A hereto).

The relief petitioner had requested from the District Court, with respect to the sentence, was that the illegal portion be "stricken from the judgment." (Appellant's Brief in the Court of Appeals, p. 44). Instead, as can be seen, the Court of Appeals authorized the District Court to impose a fine not exceeding $5,000. A Petition for Rehearing and a Petition for Rehearing *en banc*, both challenged that grant of authority to the District Court, upon the ground that the imposition of a fine would constitute an illegal increase in the valid portion of the original sentence. Those petitions were denied (3a, 4a).

Pursuant to the Remand Order of the Court of Appeals; the petitioner was resentenced in the District Court on August 6, 1975. The District Court did, in fact, impose a $5,000 fine in place of the $5,000 contribution.

An appeal was taken to the Court of Appeals, upon an expedited basis. However, the time was about to run for the filing of a Petition for a Writ of Certiorari with this Court with respect to the original judgment of the Court of Appeals. For that reason, a Petition for a Writ of Certiorari was timely filed, *Zeehandelaar* v. *United States*, Docket No. 75-277. That Petition, which is still pending, raises, *inter alia*, the question of whether the Court of Appeals properly authorized the District Court to impose a fine in place of the illegal forced contribution.

On September 8, 1975, the Court of Appeals affirmed the Order of the District Court which had imposed the fine upon the petitioner. The instant petition is filed for the purpose of seeking review of that affirmance.

Reasons for Granting the Writ

The concededly illegal portion of the sentence imposed upon the petitioner should have been stricken from the judgment and no additional punishment should have been imposed upon him. By substituting a fine in place of the illegal portion of the original sentence, the District Court impermissibly increased the valid portion of the original sentence in violation of the due process and double jeopardy clauses of the Fifth Amendment.

This is not a case where the District Court originally imposed a greater sentence than was authorized by law, and then merely modified the sentence by decreasing it to that which the law allows. Similarly, this is not a case where a defendant has been retried and the sentence has been increased due to some intervening revelation concerning his background, conduct or character.

In this case, the Court of Appeals authorized the District Court to impose a $5,000 fine in place of an illegal condition of probation, and the District Court, in fact, did so. It is respectfully submitted that the only remedy available for the correction of an illegal condition of probation is the deletion of that condition from the sentence. The conversion of the illegal provision into a $5,000 fine constituted an impermissible increase in the valid portion of the sentence, in violation of the double jeopardy and due process clauses of the Fifth Amendment. Such an increase is clearly violative of the principles enunciated in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969); *Owensby* v. *United States*, 385 F.2d 58 (10th Cir., 1967); *Pugliese* v. *United States*, 353 F.2d 514 (1st Cir., 1965) and *Ekberg* v. *United States*, 167 F.2d 380, 380-388 (1st Cir., 1948).

In *Ekberg*, *supra*, a defendant was convicted upon three counts of an indictment. He was sentenced to a term of two years and one month on each of the three counts, with the sentences on the second and third counts to run concurrently, but consecutively to the sentence imposed on the first count. Additionally, the Court suspended the execution of the sentences on the second and third counts and placed the defendant on probation for a period of five years commencing upon the completion of the service of sentence on the first count. On appeal, the Court of Appeals held that the sentence under count one should never have been imposed. This ruling manifestly overturned the sentencing scheme anticipated by the sentencing judge. The question thus presented was whether the sentences imposed under the second and third counts could validly be modified in order to realize the original sentencing objective of the sentencing judge. The Court of Appeals, upon the following reasoning, held that this could not be done:

> "It is true that the judge could lawfully have originally sentenced appellant to a maximum of three

> years on each of Counts II and III, to run consecutively, because, as above pointed out, those two counts stated separate and distinct offenses. Hence, it might be suggested that the District Court, in the course of striking out the invalid sentence on Count I, should now be allowed to resentence appellant on Counts II and III. But it is quite plain that merely because the trial judge could have imposed consecutive sentences on Counts II and III equal to the aggregate sentences which he actually imposed on invalid Count I and valid Counts II and III, 'the matter may not be treated as though he had done so.' *Miller* v. *United States*, *supra*, 2d Cir., 1945, 147 F.2d 372, 374. It is too late to go back and start over again. The concurrent sentences on Counts II and III were valid as originally imposed. Disregarding the invalid sentence under Count I, and attributing the time served to the sentences under Counts II and III, as must be done, it will be seen that the appellant has fully paid the penalty, exacted by society through the sentence of a competent court, for the only offense of which he was properly convicted. It would trench upon the double jeopardy clause if appellant were now faced with the possibility of an increase of the sentences imposed upon Counts II and III. [Citations omitted]." 167 F.2d at 388.

In the present case, the Court of Appeals permitted the District Court ". . . to go back and start over again." We respectfully submit that, in doing so, the District Court violated the defendant's rights under the due process and double jeopardy clauses of the Fifth Amendment.

Respectfully submitted,

JAC M. WOLFF
HENRY J. BOITEL
Attorneys for Petitioner
Fred J. Zeehandelaar

September, 1975

APPENDIX A

(Order of the Court of Appeals Affirming Conviction)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1026

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of May, one thousand nine hundred and seventy-five.

Present:

J. EDWARD LUMBARD
PAUL R. HAYS
WILLIAM HUGHES MULLIGAN
Circuit Judges

UNITED STATES OF AMERICA,

Appellee,

—against—

FRED J. ZEEHANDELAAR,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix A—Order of Affirmance

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed except as to the sentence imposed. None of the other arguments raised on appeal has merit; however, it was improper for the trial court to order appellant to pay a sum to the Department of Interior, "which shall be used in connection with the preservation of endangered species. . . ." Such a forced contribution is an improper sentence. Accordingly, we affirm in all respects except as to the sentence imposed, and we remand to the lower court solely for resentencing; any fine imposed upon such resentencing may not exceed $5,000, the amount of the contribution originally imposed.

/s/ J. EDWARD LUMBARD
J. EDWARD LUMBARD

/s/ PAUL R. HAYS
PAUL R. HAYS

/s/ WILLIAM HUGHES MULLIGAN,
WILLIAM HUGHES MULLIGAN, USCJs

APPENDIX B

Order of the Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

75-1026

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of July, one thousand nine hundred and seventy-five.

Present:

HON. J. EDWARD LUMBARD,
HON. PAUL R. HAYS,
HON. WILLIAM H. MULLIGAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

—v.—

FRED J. ZEEHANDELAAR,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk

By: VINCENT A. CARLIN,
Chief Deputy Clerk.

APPENDIX C

Order of the Court of Appeals Denying Rehearing *en banc*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

75-1026

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of July, one thousand nine hundred and seventy-five.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

FRED J. ZEEHANDELAAR,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard *en banc* having been filed herein by counsel for the appellant, Fred J. Zeehandelaar, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ IRVING R. KAUFMAN,
IRVING R. KAUFMAN,
Chief Judge.

APPENDIX D

(Order of the Court of Appeals Affirming Resentence)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ORDER
75-1314

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRED J. ZEEHANDELAAR,

Defendant-Appellant.

By order dated May 7, 1975, this Court remanded the above-entitled action to the District Court for resentencing. Upon remand, the District Court on August 6, 1975 imposed a new sentence of one year unsupervised probation and a $5,000.00 fine. Defendant promptly filed his notice of appeal and moved for expedited consideration of his case, which we granted.

The only question now before this Court is the propriety of the new sentence. We find no error and accordingly affirm the order of the District Court.

/s/ J. EDWARD LUMBARD
J. EDWARD LUMBARD

/s/ PAUL R. HAYS
PAUL R. HAYS

/s/ WILLIAM H. MULLIGAN, USCJs
WILLIAM H. MULLIGAN,

Dated: September 8, 1975.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-277 and 75-515

FRED J. ZEEHANDELAAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that the grand jury was deceived into returning an indictment against him and that the redaction of the indictment by the district court denied him the right to be tried upon the indictment as found by the grand jury. Petitioner also claims that prosecutorial misconduct denied him a fair trial, and that the district court on remand illegally increased his sentence.

Petitioner is a dealer in wild animals. In a previous trial in the United States District Court for the Southern District of New York he was convicted of making a false statement, in violation of 18 U.S.C. 1001, in connection with an application to the Department of the Interior to import cheetahs into the United States. That conviction was reversed on appeal.[1] At the trial in that case the government offered evidence of similar acts by petitioner in the form of testimony from Melvin Lovell, an amateur wild animal breeder, that petitioner had suggested two illegal means by which Lovell could obtain cheetahs in circumvention of the restrictions of the Endangered Species Conservation Act of 1969[2] (by siphoning off animals legally imported under a previously granted Interior Department authorization, or by backdating contracts of sale to invoke hardship exemptions provided by the Act). Petitioner testified that Lovell, and not he, had proposed such illegal conduct.

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[1] The court of appeals ruled (its decision is reproduced at Appendix D of the petition in No. 75-277) that the indictment charging petitioner did not specify whether his false statement consisted of his representation that he had a contract for the purchase of cheetahs before they were noticed for listing as an Endangered Species (which petitioner argued he in fact had) or of his backdating certain documents (which he does not dispute, Pet. 6). *United States* v. *Zeehandelaar*, 498 F.2d 352 (C.A. 2).

[2] 16 U.S.C. 668aa *et seq.*, superseded by the Endangered Species Act of 1973, 16 U.S.C. (Supp. IV) 1531 *et seq.*

The instant case arises on the basis of this testimony, for which petitioner was charged and convicted, after jury trial in the Southern District of New York, of making a false material declaration at a prior trial, in violation of 18 U.S.C. 1623.[3] He was sentenced to one year of unsupervised probation and, as a condition of probation, ordered to pay $5,000 to the Department of the Interior for use in connection with the preservation of endangered species. The court of appeals affirmed his conviction without opinion but remanded to the district court for correction of sentence (Pet. No. 75-277 App. A). On remand the district court removed the condition of probation and imposed a $5,000 fine. The court of appeals affirmed the resentencing (Pet. No. 75-515 App. D).[4]

1. Petitioner's first contention is that, by editing his testimony from the previous trial, the government misled the grand jury into returning an indictment against him.

It is undisputed that petitioner and Lovell had two conversations, both on the same day, one by telephone and the other face-to-face at the Arizona Inn in Tucson. At the previous trial, Lovell had testified that petitioner suggested illegal evasions of

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[3] Petitioner was also reindicted for making a false statement to the Department of the Interior, but this charge was dismissed by the government at the close of trial in the instant case.

[4] Petitioner seeks review of the judgment affirming his conviction in No. 75-277 and of the judgment affirming the resentencing in No. 75-515.

the Endangered Species Conservation Act during the latter meeting, and that the telephone conversation was innocuous. Petitioner said that the meeting was innocuous and that Lovell suggested the illegality over the phone. At trial of the instant case Lovell repeated his version; petitioner did not testify.

Petitioner's testimony from the previous trial appeared in an edited version in the indictment. This version did not indicate that a face-to-face conversation followed the telephone call, but instead made it appear that petitioner's testimony about the telephone conversation included both the allegation of Lovell's illegal proposal and his own general denial of ever having suggested illegality himself.[5] Petitioner asserts (Pet. 9) that this editing deceived the grand jury into believing "that it was indicting the petitioner for perjurious testimony relating to his version of the telephone conversation" alone and that the indictment was therefore a nullity.

This claim is wholly without basis. The substance of the conflict between the testimony of the two men was over who, if either, had proposed unlawful

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[5] Petitioner's testimony at the previous trial, and the edited version of that testimony contained in the indictment, are shown on the chart at Appendix E of the petition in No. 75-277. We acknowledge, as we did on appeal (see our appellate brief at page 13, note), that complete accuracy would have been served had asterisks indicated the deletion of irrelevant matter. The failure so to indicate, however, was by no means calculated or intended to deceive the grand jury, as a review of the omitted testimony, none of which is favorable to petitioner or harmful to the government, will show. Nor was the grand jury in fact deceived, see text *infra*.

acts. Petitioner was charged with falsely declaring that Lovell had proposed criminal conduct and that he himself had not. Whether the falsity occurred during one or the other of two conversations, held within hours of each other, was of no significance. Thus there is no reasonable basis for saying that the grand jury was "deceived" into returning the indictment against petitioner.

Moreover, the corollary of petitioner's argument —that had the grand jury been expressly apprised of the full extent of petitioner's testimony it would not have indicted—is baseless, since the testimony omitted from the indictment contains no suggestion whatever that the testimony charged as perjury was not perjurious (and petitioner does not argue otherwise).

In short, petitioner's argument that the wording of the indictment deceived the grand jury is not sufficient to overcome the presumption of regularity concerning grand jury proceedings. *Costello* v. *United States*, 350 U.S. 359; *United States* v. *Nunan*, 236 F. 2d 576, 594 (C.A. 2), certiorari denied, 353 U.S. 912; *Beatrice Foods Co.* v. *United States*, 312 F. 2d 29, 39 (C.A. 8), certiorari denied, 373 U.S. 904. The government did nothing more than delete certain portions of petitioner's testimony so as to eliminate irrelevant material. This was entirely proper and did not invalidate the indictment. *United States* v. *Dunham Concrete Products, Inc.*, 475 F. 2d 1241, 1248-1249 (C.A. 5), certiorari denied, 414 U.S. 832; *United States* v. *Rook*, 424 F.2d 403, 405 (C.A. 7), certiorari denied, 398 U.S. 966.

2. Petitioner claims next that the redaction of the indictment by the district court deprived him of his Fifth Amendment right to be tried on the indictment returned by the grand jury. But the redaction did not materially alter the indictment any more than the edited version appearing in the indictment altered petitioner's trial testimony in any relevant manner.

The redaction by the court came about as a result of petitioner's motion to dismiss the indictment on the ground that its allegations were too imprecise to enable him to prepare a defense (A21-A22).[6] In response, the government proposed deleting those portions of the indictment that were irrelevant to the charge that petitioner had testified falsely when he said that Lovell and not he had proposed illegal evasion of the Endangered Species Conservation Act. Petitioner now argues that in redacting the indictment to give it greater precision the trial court impermissibly amended it, in derogation of this Court's decisions in *Ex Parte Bain*, 121 U.S. 1, and *Stirone* v. *United States*, 361 U.S. 212.

Those cases do not forbid immaterial alteration or narrowing of indictments, however, and thus do not support petitioner's argument. As the Court said in *Stirone* (361 U.S. at 215-217), "Ever since [*Bain*] was decided in 1887 it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself. * * * The *Bain* case,

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[6] The indictment as redacted also appears at Appendix E of the petition in No. 75-277. "A" refers to petitioner's Appendix filed in the court of appeals.

which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him."

The material here omitted by the district court can in no wise be said either to have broadened the charge against petitioner or to have added charges not made in the indictment as it originally was issued. Only inconsequential, background testimony was deleted, and the district court's decision to strike this prefatory matter was simple recognition that it was not materially false and that, consequently, it was unnecessary to the indictment. In so doing the district court was not impermissibly "second-guessing" the grand jury. The stricken testimony was superfluous, its elimination did not create a material change in the indictment, and there is no likelihood whatever that the indictment would not have been voted without it. *See United States* v. *Cirami*, 510 F.2d 69, 73 (C.A. 2); *United States* v. *Colasurdo*, 453 F. 2d 585 (C.A. 2), certiorari denied, 406 U.S. 917.

Moreover, contrary to petitioner's assertion, the excision of this surplusage cannot be said to have misled the trial jury as to the context of the questions and answers set forth as perjurious, since petitioner's testimony at his first trial concerning his dealings with Lovell was read to the trial jury in its entirety (A977-A985).[7]

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[7] For this reason also there is no merit to petitioner's suggestion (Pet. 18, note) that the redaction prejudiced him in connection with the testimony of Frank Gilbert, an associate

In sum, the redaction of the indictment was "merely a matter of form" (*Russell* v. *United States*, 369 U.S. 749, 770) and did not alter the focus of the issues to be resolved. That focus was initially and remained throughout the trial on the question whether petitioner testified falsely at his previous trial when he said that Lovell and not he proposed that certain illegal actions be taken in order to import cheetahs into the United States. The truth or falsity of petitioner's testimony was the question to be resolved by the jury, not whether the critical statements in issue had occurred at one conversation with Lovell or at another several hours later.

3. Petitioner's assertions of prosecutorial misconduct (Pet. 25-26) are also wide of the mark. In explaining why Lovell and Gilbert remembered their encounter with petitioner, the prosecutor stated (A 1145):

> And why do they remember that [conversation]? Because these men have no criminal record, no prior involvement with the law, they are intelligent people, and for somebody to come up to

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of Lovell's. Petitioner had said that Lovell had suggested illegal evasion of the law during the telephone conversation, to which Gilbert was not a party, but the question by the prosecutor whether Gilbert recalled such a suggestion emanating from Lovell was designed to test his recollection whether Lovell had at any time proposed backdating documents to deceive the Department of the Interior. In any event, petitioner's entire testimony in this regard was read to the jury, and Gilbert's testimony thus did not "falsely appear" to contradict petitioner.

> them and propose that they do something illegal was surprising and shocking, and they remember it.

Although neither witness had been asked specifically at trial whether he had a criminal record, the prosecutor's statement was a reasonable inference from testimony given. Defense counsel had questioned the government witnesses on various alleged minor misdeeds but had failed to uncover any criminal record [8] Nevertheless, when defense counsel objected the prosecutor cautioned the jury that "more correctly put, [there was] an absence of proof" (A1146) of any criminal records, thereby curing any error there might have been.

Nor did the prosecutor comment upon petitioner's failure to testify. From 30 pages of transcript petitioner culls three remarks of the prosecutor upon which he bases his claim:

> What is the version of what happened by the witnesses who testified here in front of you? [A1132-A1133.]
>
> So the case boils down to, really, do you believe these witnesses who testified here? [A1142.]

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[8] For example, defense counsel questioned Lovell about his practicing as an electrical engineer despite his lack of an engineering degree (A524-A525) and his alleged failure to make child support payments (A540-A544). The defense also pointed out that Sue Pressman, another government witness, had received mail addressed to her as Dr. S. Pressman although she did not hold either an M.D. or Ph.D. degree (A1011-A1017).

> The Government submits to you that based on the credibility of the witnesses in this case, none of which were contradicted in any way whatsoever * * * [A1152.]

There was nothing in these isolated comments which the jury would naturally or necessarily interpret as a comment on petitioner's silence. See *United States* v. *Dioguardi*, 492 F.2d 70, 81-82 (C.A. 2), certiorari denied, 419 U.S. 873. Petitioner had already given his version of events at the earlier trial, and the purpose of the trial was to contrast and compare that version with the version told by the government's witnesses. All of the comments referred to above did no more than invite this comparison. The reference to the absence of contradiction was not a comment on petitioner's silence, for his version of events clearly did contradict the testimony of the government's witnesses; rather, this remark was intended to draw the jury's attention to the consistency of testimony given by those witnesses. Any misapprehension that the jury might have had on this account was in any event corrected by the district court's instruction that no inference was to be drawn against petitioner for his failure to testify (A1185).

4. Petitioner's final claim is that the district court on remand illegally increased his sentence. Initially the court sentenced petitioner to one year of unsupervised probation and, as a condition of probation, ordered him to pay $5,000 to the Department of the Interior for use in connection with the Endangered Species program. The court of appeals ruled

(Pet. App. A, p. 2a) that "[s]uch a forced contribution is an improper sentence" and remanded for resentencing with the instruction that "any fine imposed upon such resentencing may not exceed $5,000, the amount of the contribution originally imposed." The district court thereupon imposed a $5,000 fine, as the court of appeals had said it might.

Contrary to petitioner's claim (No. 75-515, p. 6), the resentencing did not violate *North Carolina* v. *Pearce*, 395 U.S. 711. That case held that due process requires "that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial" and that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear" (*id.* at 725-726). Here there can be no question of vindictiveness, for petitioner's punishment was not increased in the sense contemplated by *Pearce*.[9] Following the first sentencing petitioner faced a choice of paying $5,000 or sacrificing his probation to possible imprisonment. Following the resentencing petitioner remained in effect in the same position. The sole practical difference lay not in the punishment meted out but in the recipient of the money. It is no more onerous for

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[9] Moreover, the revision of the sentence was within parameters dictated by the court of appeals and thus did not reflect the concern to which *Pearce* was addressed—possible vindictiveness by a trial judge resentful over a successful appeal. Cf. *Colten* v. *Kentucky*, 407 U.S. 104.

petitioner to pay $5,000 to the general treasury than to pay the same sum to the Department of the Interior and his argument that his sentence was illegally increased is thus without merit.[10]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[10] *Ekberg* v. *United States*, 167 F.2d 380 (C.A. 1), cited by petitioner (No. 75-515, p. 6), is inapplicable. There a conviction on one count was reversed and the court of appeals said that the sentences on two other counts, valid when imposed, could not subsequently be altered. Here, by contrast, the court of appeals remanded, not so that a sentence valid when imposed might be altered, but for correction of an improper sentence on the only count on which petitioner was convicted. Nothing in *Ekberg* would prohibit the resentencing here.

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